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No. 90-1068 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NATIONAL RIFLE ASSOCIATION, *et al.*,
Petitioners,

v.

NICHOLAS F. BRADY,
SECRETARY OF THE TREASURY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Crandon v. *United States*, 110 S.Ct. 997 (1990)	5
D & W Food Centers, Inc. v. *Block*, 786 F.2d 751 (6th Cir. 1986)	4
Federal Communications Commission v. *American Broadcasting Company*, 347 U.S. 284 (1954)	2
Farmer v. *Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 753 (1991)	2, 6
United States v. *Bass*, 404 U.S. 336 (1971)	4
Young v. *Community Nutrition Institute*, 476 U.S. 974 (1986)	2-3

STATUTES

18 U.S.C. § 926	6
21 U.S.C. § 333	3
21 U.S.C. § 335	3
21 U.S.C. § 336	3
21 U.S.C. § 676	3-4

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ARGUMENT

The doctrine that courts must defer to agency interpretations of a statute susceptible to two interpretations, in an ever increasing manner, strains the constitutional precept that the judiciary interprets the law. This Court should grant certiorari to clarify that the deference rule has no application to interpretation of the criminal code, but that the rule of lenity applies in the interpretation of the criminal code even where regulations are at issue.

Contrary to respondents (Br. at 6), petitioners do challenge the Fourth Circuit's ruling that the regulations are reasonable, because the regulations are con-

trary to the plain language of the statute.[1] However, the Fourth Circuit stated that each of the statutory provisions at issue are reasonably susceptible to two interpretations, one of which would impose criminal liability and one of which would not.[2] This is why the rule of lenity, not the rule of deference, applies.

1. The Fourth Circuit opinion conflicts with this Court's precedents, and there is a conflict among the circuits on the questions presented. The Fourth Circuit in the case at bar, and the Eleventh Circuit,[3] have held that deference is due to agencies in the interpretation of ambiguities in the criminal code where regulations are at issue. All other circuits have continued to follow the rule set forth in *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284 (1954), that deference is not due to agencies in interpretation of the criminal code even in the promulgation of regulations.[4]

2. Respondents fail to respond to this Court's clear ruling that deference is not due in interpretation of an ambiguous criminal provision. Br. at 7. No rule of law is asserted as would justify deference to the agency in interpretation of the criminal code.

The only case respondents cite for their position is *Young* v. *Community Nutrition Institute*, 476 U.S. 974

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[1] The relevant statutory provisions speak broadly of premises from which business is conducted, not of whether the premises are open to the public; of gun shows, not of gun shows sponsored by certain organizations; and of personal collection firearms, which require no recordkeeping, not of personal collection firearms obtained from business inventory which require limited recordkeeping. Petition at 8-11.

[2] Petition at 8-12.

[3] *Farmer* v. *Higgins*, 907 F.2d 1041, 1045 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 753 (1991).

[4] See cases cited in Petition at 16 n. 16-17.

(1986), which they characterize as "deferring to the FDA's interpretation of the food and drug laws, a criminal regulatory scheme." Br. at 7. The food and drug laws are included in Title 21, a regulatory scheme, and not in Title 18, the criminal code. Enforcement is based on injunction proceedings and primarily misdemeanor penalties, and not felony penalties.[5] *Young* stated nothing about deference in interpretation of a criminal statute, nor did it consider the rule of lenity. While the Court deferred to the agency, the regulation in question *removed* any possibility of criminal liability.[6] The FDA was sued by a public interest group which demanded that the agency regulate a certain commodity. 476 U.S. at 978. Accordingly, the matter on which the Court deferred to the agency had no criminal ramifications whatever.[7]

The Food and Drug Act is part of the same regulatory scheme as the Federal Meat Inspection Act ("FMIA"), which carries identical penalties. Those violations are punished as a misdemeanor,[8] good faith is a defense,[9] minor violations are not prosecuted,[10] and a

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[5] The general penalty is a misdemeanor, and even then good faith is a defense. 21 U.S.C. § 333(a), (c). Felony penalties apply only where fraud or a second offense exists. § 333(b). Before an alleged violation is reported by the Secretary to a prosecutor, the alleged violator is entitled to present his views. § 335. Minor violations need not be referred to a prosecutor, and a written warning may suffice. § 336.

[6] The agency ruled that interstate shipments of certain corn would not be subject to regulation. 476 U.S. at 978.

[7] It is worth noting that the enabling statute in that case provided that "the Secretary shall promulgate regulations . . . to such extent as he finds necessary for the protection of public health . . . ." *Id.* at 977. As shown *infra*, the enabling statute in the case at bar is more limited.

[8] 21 U.S.C. § 676(a).

[9] *Id.*

[10] *Id.* § 676(b).

person is entitled to a hearing to try and persuade the Secretary not to refer the matter for prosecution.[11] Even with these lenient provisions, deference is improper. In *D & W Food Centers, Inc.* v. *Block*, 786 F.2d 751, 758 (6th Cir. 1986), the court rendered declaratory and injunctive relief against the agency in part because of the following:

> Any remaining doubt that the Secretary's construction of § 606 must be rejected disappears when we consider the criminal provisions of the FMIA. § 676(a) provides criminal penalties for violation of any section of the Act. No principle of law is better established than the necessity of the criminal law speaking clearly. Accordingly, courts are bound to construe narrowly the applicability of any criminal statute. *E.g., United States* v. *Bass*, 404 U.S. 336, 346-48. . . . (1971).

Respondents claim that petitioners mischaracterize the rule of lenity, but point to no specific mischaracterization. Instead, respondents cite truisms which do not address the issues here. Br. at 7. Respondents fail to address the essence of the rule of lenity, that criminal statutory provisions susceptible to two reasonable alternative interpretations must be interpreted against the government and in favor of persons to whom the criminal provisions apply.

Respondents assert that the rule of lenity is inapplicable to this case (Br. at 7-8), but fail to address the basis of such an assertion where the criminal code is at issue. Instead, respondents assert that the regulations are "principally" licensing requirements, and imply that criminal prosecutions are somehow irrelevant. Br. at 8. Yet these are the very kinds of regulations that have previously led to widespread criminal prosecutions. *See* Petition at 13 & n.11.

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[11] *Id.* § 676(c).

Respondents imply that their interpretation of the criminal code is somehow entitled to deference, because BATF enforces licensing requirements, while the Department of Justice brings prosecutions. Br. at 8 n.7. Yet *American Broadcasting*, 347 U.S. at 296, addresses this very issue:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. *There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.* If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly. (Emphasis added).

3. Respondents claim that the Fourth Circuit's deference to the agency is somehow "not inconsistent" with *American Broadcasting*, but fail to quote from or to analyze that precedent. Br. at 8-9. Indeed, *American Broadcasting* squarely contradicts the Fourth Circuit's decision and the government's position. *American Broadcasting* held that no deference is due to agencies in promulgation of regulations under a criminal statute, and instead that the rule of lenity applies. 347 U.S. at 296.

Respondents also fail to distinguish *Crandon* v. *United States*, 110 S.Ct. 997 (1990). Br. at 8. Although regulations were not at issue, the Court held about that civil case: "Because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage." 110 S.Ct. at 1001-02.[12]

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[12] Respondents again claim that the Department of Justice, not BATF, prosecutes criminal cases. Br. at 8 n. 8. Again, as *American*

4. Finally, respondents argue that Congress' amendment to 18 U.S.C. § 926 had no effect. Br. at 9-10. Congress deleted the authority to "prescribe such rules and regulations as he [the Secretary] *deems* reasonably necessary," and provided that "the Secretary may prescribe *only* such rules and regulations as *are* necessary . . . ." (Emphasis added.) This language and the legislative history of the Firearms Owners' Protection Act shows that Congress intended to diminish the Secretary's discretion in the promulgation of regulations, and therefore that the courts should not give so much deference to the agency. See Petition at 21-29.

The Senate Report explains that the substitution of "necessary" for "reasonably necessary" was to remove a redundancy. That part of the report does not purport to address why Congress deleted the terms "he deems" (which imply discretion) and inserted the term "only" (which implies the least restrictive approach). Further, the report promised a reduction in regulations, and the floor speeches by the bill sponsors explained explicitly that the amendment was intended to remove discretion by and deference to the agency. *See* Petition at 22-24.

Respondents argue that the floor speeches in Congress are not entitled to any weight. Br. at 10. Yet in this very term of the Court, the government argued that BATF regulations should be upheld because of an intent allegedly expressed in the floor debates even though not expressed in the statute. In that case, the Eleventh Circuit relied exclusively on floor debates and did not cite any committee reports. *Farmer* v. *Higgins*, 907 F.2d 1041, 1044-45 (11th Cir. 1990), *cert. denied* 111 S.Ct. 753 (1991).[13]

Broadcasting noted, there cannot be one interpretation for an agency and another for the Department of Justice.

[13] For the government's position in that case, see Brief for the Respondent in Opposition at 7-8.

A double standard appears to be applied regarding the validity of BATF regulations. When in its interest, the agency argues that every word in a statutory amendment must be given effect, because "we may not assume Congress to have done a 'useless, ineffective thing' [when it enacted legislation].'" *Farmer* v. *Higgins*, 907 F.2d at 1044. But in the case at bar, a statutory amendment intended to curtail the Secretary's authority, according to the government, is nothing more than a mere stylistic change. Similarly, legislative history is relevant or irrelevant depending upon whether it suits the agency's interest.

Consistent standards of jurisprudence should be applied, even where politically controversial matters are at stake. It is clear enough that Congress intended to curtail the BATF's authority, and that BATF was not empowered to promulgate the regulations at issue here.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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